

The issues are: (1) whether the Office properly determined appellant's wage-earning capacity based upon actual earnings as of May 12, 2007; (2) whether appellant received an overpayment in the amount of \$12,297.61 for the period May 12, 2007 through January 19, 2008; and (3) whether the Office properly found appellant was at fault in creating the overpayment and that the overpayment could not be waived because appellant's income substantially exceeded current ordinary and necessary living expenses.

## **FACTUAL HISTORY**

This is the second appeal before the Board. Appellant, a 31-year-old clerk, filed a Form CA-1 claim for benefits on December 14, 2002, alleging that she sustained an emotional condition causally related to sexual harassment in the employing establishment. The Office accepted her claim for acute post-traumatic stress. In its May 5, 2003 letter accepting the claim, it advised appellant:

*“You are expected to return to work (including light-duty or part-time work, if available) as soon as you are able. Once you return to work, or obtain new employment, notify this office immediately. Full compensation is payable only while you are unable to perform the duties of your regular job because of your accepted employment-related condition. If you receive a compensation check which includes payment for a period you have worked, return it to us immediately to prevent an overpayment of compensation.”* (Emphasis added.)

By decision dated March 16, 2004, the Office terminated appellant’s compensation benefits for refusing an offer of suitable work. By decision dated May 6, 2004, it denied a merit review of appellant’s case. In a December 9, 2004 decision,<sup>1</sup> the Board reversed the Office’s March 16 and May 4, 2004 decisions, finding that the Office failed to meet its burden to terminate appellant’s compensation pursuant to section 8106(c). Following the Board’s reversal of the suitable work termination, by letter dated May 4, 2005, the Office informed appellant that her loss of wage-earning capacity, every four weeks had been determined to be \$1,284.00.

By letters dated May 10, 2007, the employing establishment informed appellant that she had been selected for reassignment as a part-time city carrier, effective May 12, 2007.

By letter dated May 11, 2007, appellant informed the Office that she was returning to work effective May 12, 2007. She stated that she had accepted a bargaining unit transfer assignment with the employing establishment; she noted that the position was the product of an in-service transfer program available to bargaining unit employees and was not a position which resulted from a permanent job offer from the Office. Appellant asserted that this type of position, obtained through transfer, did not result in a position with the same benefits, standing and pay rate she had as of the date of injury. She advised that because she was changing job titles from clerk to city carrier she did not know what her new hourly pay rate would be. Appellant noted that, because this was a transfer and not a permanent job offer, she was not guaranteed 40 hours per week, no longer got paid holidays, no longer had a fixed five-day-per-week, eight-hour-per-day schedule.

Appellant returned to work with the employing establishment on May 12, 2007. The Office, however, continued to pay her disability compensation until January 16, 2008.

The record contains a July 27, 2007 Office memorandum indicating that appellant’s husband telephoned the claims examiner to ask about appellant’s pay status. The memorandum stated that appellant’s husband noted that appellant was working again and had inquired about

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<sup>1</sup> Docket No. 06-824 (issued January 26, 2007).

whether she was still entitled to loss of wage-earning capacity benefits; in a return call, the claims examiner stated that he talked to appellant's husband about her wife's wage-earning capacity and her "part-time job."

On November 13, 2007 appellant completed a Form EN1032 wherein she certified that since May 12, 2007 she had worked as a part-time flexible city letter carrier, with no guarantee of a 40-hour workweek. She also noted that only 8 of the 24 weeks since she returned to work had been 40-hour weeks. Appellant noted that her hourly pay rate was \$24.95.

In an Office memorandum dated January 31, 2008, entitled "comp[ensation] termination sheet" appellant's pay rate was noted, as well as the proposed reason for terminating appellant's compensation. The reason stated for terminating her compensation was noted as "claimant returned to full[-]time work."

By decision dated February 8, 2008, the Office determined that her new position as city carrier with the employing establishment fairly and reasonably represented her wage-earning capacity. It found that appellant had returned to work on May 12, 2007 and that her actual earnings, which it stated were \$998.00 per week, met or exceeded the current wages of the job held when injured. Therefore, pursuant to 5 U.S.C. § 8106 and 5 U.S.C. § 8115 her entitlement to compensation for wage loss ended as of May 12, 2007, the date she was reemployed.

An Office form dated September 17, 2008, entitled "Manual Adjustment Form" noted that appellant had returned to full-time work on May 12, 2007, but continued to receive wage-earning capacity through January 19, 2008.

By letter dated September 17, 2008, the Office made a preliminary determination that an overpayment of compensation had occurred in the amount of \$12,297.61 covering May 12, 2007 through January 19, 2008. It found that appellant was at fault in creating the overpayment because she should have known that she was not entitled to receive compensation payments after she returned to work. The Office informed appellant that if she disagreed with the decision she could, within 30 days, submit evidence or argument to the Office, or request a prerecoupment hearing with the Branch of Hearings and Review.

On September 29, 2008 appellant completed and returned the Form OWCP-20 outlining her income and assets as well as her household expenses and debts, including mortgage payments and checking accounts. In addition, she requested that the Office issue a decision based on the issues of fault and waiver of recovery of overpayment.

In a letter accompanying the form, appellant stated that she was not at fault for the creation of the overpayment because: (a) she spoke by telephone with an Office claims examiner on April 20, 2007 to clarify her pay status, and he allegedly told her that he would monitor her reemployment status and assured her there was no possibility that an overpayment situation would develop; (b) she had previously returned to work with another employing establishment, the Transportation Security Administration, and had been receiving benefits through a loss of wage-earning capacity (LWEC) determination; and (c) she submitted a letter to the Office on May 11, 2008, informing it that she was returning to work with the employing establishment effective May 12, 2008 and asking the Office about the net impact of her reemployment with the

employing establishment on her LWEC and medical benefits, and whether the Office required any additional information. She stated on the form that she had attached documents and an explanation of how the overpayment occurred; however, these documents were not submitted to the Office within 30 days.

In a decision dated November 20, 2008, the Office finalized the preliminary determination regarding the overpayment of \$12,297.61. It stated that she should have been aware she was not entitled to receive compensation checks after she returned to work on May 12, 2007. The Office found that appellant was at fault in the creation of the overpayment, however waiver could not be granted because appellant's household monthly income substantially exceeded what was necessary to meet current ordinary and necessary living expenses.

### **LEGAL PRECEDENT -- ISSUE 1**

Generally, wages earned are the best measure of a wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.<sup>2</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that the Office improperly determined appellant's wage-earning capacity.

The Board notes initially that appellant has alleged that she was receiving compensation benefits based upon a wage-earning capacity determination prior to her return to work on May 12, 2007. Following the Board's reversal of the suitable work termination, the Office determined appellant's entitlement to compensation benefits. Its letter dated May 4, 2005 appears to be an informal set off of wages, and not a formal wage-earning capacity determination.

By decision dated February 8, 2008, the Office determined that appellant had returned to work as a city carrier with the employing establishment and that her earnings in this position fairly and reasonably represented her wage-earning capacity. It found that appellant had returned to work on May 12, 2007 and that her actual earnings, which it stated were \$998.00 per week, met or exceeded the current wages of the job held when injured.

Appellant had however certified in a Form EN1032 dated November 13, 2007 that her hourly pay rate in the part-time city carrier position was \$24.95. The Office determined that appellant's actual earnings were \$998.00 per week. If the hourly pay rate of \$24.95 is multiplied by 40 hours, actual earnings would total \$998.00 per week. The record reflects that appellant returned to a part-time position. The return to work offer made by the employing establishment noted that the position was a part-time position and appellant certified on November 13, 2007 that only 8 of the 24 weeks she had worked had been full time.

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<sup>2</sup> *Connie L. Potratz-Watson*, 56 ECAB 316 (2005).

As the Office determined appellant's actual earnings using a 40-hour weekly rate, while appellant worked in a part-time position, it did not properly determine that appellant's "actual earnings" fairly and reasonably represented her wage-earning capacity.

### **LEGAL PRECEDENT -- ISSUE 2**

Compensation for total disability under the Act is payable when the employee starts to lose pay.<sup>3</sup> Compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents her from earning the wages earned before the work-related injury.<sup>4</sup>

### **ANALYSIS -- ISSUE 2**

The Office found that appellant received an overpayment during the period in question because she continued to receive checks for temporary total disability compensation after returning to full-time work on May 12, 2007. It calculated an overpayment of \$12,297.61 by determining that appellant had an effective pay rate as of May 12, 2007 in the amount of \$1,361.00, and multiplying this figure by nine, the number of pay periods in which she continued to receive checks until January 19, 2008, which amounted to \$12,249.00. The Office then added \$48.61, the prorated amount in salary representing May 12, 2007, the first day she returned to work, which was also the last day of the pay period in which she returned to work, for a total overpayment of \$12,297.61.<sup>5</sup> Based on this determination, it found that appellant received an overpayment of compensation in the stated amount during that period. The Board notes, however, that appellant did not return to a full-time job in May 2007, as the Office determined. Nevertheless, the Office determined that appellant had an effective pay rate as of May 12, 2007 in the amount of \$1,361.00, consistent with a position as a full-time employee.

To determine whether an overpayment of compensation occurred in this case and to calculate the proper amount of overpayment, the Office was required to review the record and make an accurate determination of appellant's job status, wage-earning capacity and actual rate of pay. Instead, the Office neglected the evidence of record and based its overpayment finding on the salary of a full-time employee, despite ample documentation in the instant record that appellant had returned to part-time employment. For this reason the overpayment of compensation must be set aside. The case is therefore remanded to the Office for a redetermination of the issue of overpayment and, if necessary, the amount of overpayment.

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<sup>3</sup> 20 C.F.R. § 10.401(a) (2003).

<sup>4</sup> *Id.* at § 500(a) (2003).

<sup>5</sup> The Office's September 17, 2008 pay rate worksheet indicated that appellant returned to work on May 12, 2007, the last date of the pay period. It therefore divided \$1,361.00 by 28, the number of days in the pay period, to arrive at the one-day overpayment figure of \$48.61, which it then added to the nine-month overpayment of \$12,249.00, for a total overpayment of \$12,297.61.

### **LEGAL PRECEDENT -- ISSUE 3**

The Office's regulations at 20 C.F.R. § 10.433(a) further provide: "OWCP may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment." The regulations further provide that each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments she receives from the Office are proper. Under the regulations, a recipient will be found to be at fault with respect to creating an overpayment if the recipient "accepted a payment which he or she knew or should have known to be incorrect."<sup>6</sup>

### **ANALYSIS -- ISSUE 3**

In the final overpayment determination, the Office determined that appellant was at fault in the creation of the overpayment, because she accepted compensation benefits after she returned to work on May 12, 2007. Appellant has alleged that she believed she was entitled to receive continuing compensation benefits because she was receiving compensation pursuant to a wage-earning capacity determination. The Office proceeded to a waiver determination, even though it stated that appellant had been determined to be at fault in the creation of the overpayment. An overpayment of compensation can not be waived if appellant is at fault in the creation of the overpayment. Given the contrary findings of fact concerning waiver of overpayment, and the fact that the Office never addressed appellant's allegations regarding her continuing entitlement to compensation benefits after her May 12, 2007 return to work because of the prior wage-earning capacity determination, the Office's determination of fault must also be set aside.

### **CONCLUSION**

The Board reverses the February 8, 2008 wage-earning capacity determination and the November 20, 2008 Office determination that appellant received an overpayment of compensation in the amount of \$12,297.61 for the period May 12, 2007 through January 19, 2008. After such further development as necessary the Office shall issue a *de novo* decision regarding appellant's receipt of overpayment of compensation.

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<sup>6</sup> 20 C.F.R. § 10.433(a)(3) (1999).

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 20 and February 8, 2008 decisions of the Office of Workers' Compensation Programs be reversed and remanded for redetermination of the issue of overpayment.

Issued: December 28, 2009  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board